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In the Supreme Court of the United States

OCTOBER TERM, 1996

W. H. AVITTS, ET AL.,

Petitioners,

v.

AMOCO PRODUCTION CO., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS APACHE CORPORATION AND MW PETROLEUM CORPORATION

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QUESTION PRESENTED

Does 28 U.S.C. §1447(c), which permits a federal court remanding a case to award costs and expenses "incurred as a result of removal," authorize such an award against a defendant joined *after* a removal that the plaintiff never challenged?

RULE 29.6 STATEMENT

Respondent Apache Corporation has no parent company. Respondent MW Petroleum Corporation is a wholly-owned subsidiary of Apache Corporation. Listed below are the companies and partnerships that are partly but not wholly owned by Apache Corporation or one of its wholly-owned subsidiaries:

Apache International, Inc.
Apache Oil Australia Pty Limited
Apache Qarun Corporation LDC
Apache Offshore Investment Partnership
Apache 681/682 Joint Venture
Main Pass 151 Pipeline Company
Main Pass Block 151 - Offshore
Main Pass 151 Gas Pipeline Company
Apache Series 1996-A Trust
Apache Poland Sp. z o.o. and FX Energy Poland Sp. z o.o. (East) Commercial Partnership

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-394

W. H. AVITTS, ET AL.,

Petitioners,

v.

AMOCO PRODUCTION CO., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS APACHE CORPORATION AND MW PETROLEUM CORPORATION

The petitioners challenge the Fifth Circuit's decision that the federal remand statute's fee-shifting provision does not authorize an award of costs and expenses against a defendant who was not a party at the time of removal. Because the decision is so clearly correct and raises no issue on which the courts of appeals are in conflict, the petition for certiorari should be denied.

STATEMENT

The petitioners, a group of landowners, filed this action in Texas state court against respondent Amoco Production Company ("Amoco") on July 2, 1990. The landowners contended that Amoco's oil field operations had harmed their properties. Because the complaint alleged violations of federal law, Amoco removed the case to the United States District

Court for the Southern District of Texas on October 15, 1990. The landowners did not contest the removal. Pet. App. 16.

On October 17, 1991, more than a year after the uncontested removal, the landowners filed their Third Amended Complaint, which, for the first time, named respondents Apache Corporation ("Apache") and MW Petroleum Corporation ("MW") as co-defendants. *Id.* at 16. The Third Amended Complaint, which was served on Apache and MW on January 27, 1992, alleged federal jurisdiction. Throughout the district court proceedings, the landowners continued to contend that federal jurisdiction existed, defeating defendants' motion to dismiss for lack of jurisdiction. *Id.* at 16-17.

The case came to trial on November 8, 1993. Four days after the trial began, the district court aborted the proceedings and ordered Amoco, Apache, and MW to conduct an environmental study of the property and to pay the plaintiffs' attorney's fees and expenses, citing the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701-2761. Pet. App. 17. Amoco appealed both orders; Apache and MW appealed only the order to pay attorney's fees and expenses. On May 22, 1995, the Court of Appeals for the Fifth Circuit held that the district court lacked subject matter jurisdiction and instructed the district court to remand the case to state court. *Id.* at 9.

On remand to the district court, the landowners sought costs and expenses under 28 U.S.C. § 1447(c). The statute permits a remand order to require payment of "just costs and any actual expenses, including attorney fees, incurred as a result of removal." The district court found Amoco, Apache, and MW jointly and severally liable to the landowners for $641,509.46, which represented essentially all of the landowners' litigation costs, including reasonable attorney's fees, incurred to that date. Pet. App. 12 & n.1.

Amoco, Apache, and MW appealed the § 1447(c) award, and the Fifth Circuit reversed. It ruled that Apache and MW could not be ordered to pay any costs relating to the removal

because they became parties *after* the removal. Because "a court's discretion to award attorney's fees under § 1447(c) is triggered only if the court first finds that the defendant's decision to remove was legally improper," the court reasoned, defendants sued after the case had already been removed were not subject to such an award. Pet. App. 18. The court then denied the § 1447(c) award against Amoco on the ground that the landowners themselves, who had never sought a remand, "bear a substantial share of the responsibility for the case remaining in federal court." *Id.* at 22.

REASONS FOR DENYING THE PETITION

As explained in Amoco's brief in opposition, the landowners have identified no issues that even remotely begin to merit this Court's consideration. The Fifth Circuit correctly held that the landowners could not recover costs and expenses under § 1447(c) from any of the defendants under the particular circumstances of this case, and no decision by any court of appeals conflicts with that ruling. But even if this case otherwise presented issues worthy of review, absolutely no reason exists to revisit the Fifth Circuit's holding that Apache and MW are not liable for removal costs. There can be no doubt that § 1447(c) does not authorize an award of removal costs against defendants sued *after* removal.

Section 1447(c) provides that an order remanding a case "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." In determining whether an award of costs and expenses is justified, courts first examine the defendant's conduct in removing the case. See, e.g., *Excell, Inc.* v. *Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) ("the key factor is the propriety of the defendant's removal"); *Miranti* v. *Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (courts "invariably take into consideration the defendants' decision to remove"); see also Commentary to the 1988 Revision of Section 1447 by David D. Siegel following 28 U.S.C.A. § 1447 (West 1994) ("subdivision

(c) now authorizes the court to add 'actual expenses, including attorney's fees,' *should it find that it was improper for the defendant to remove the case"* (emphasis added)). There is no basis for shifting costs to a defendant who was not a party at the time of removal, because there is no relevant conduct by such a defendant for the court to assess. No court has held otherwise.[1]

Noting that § 1447(c) does not expressly limit liability for costs and expenses to removing defendants, the landowners argue that Apache and MW should be liable because they "accept[ed]" removal. Pet. 10. But it is ludicrous for the landowners to try to shift their fees to Apache and MW for failing to extricate this case from federal court. The landowners themselves, who litigated this matter in federal court for 15 months before Apache and MW even became parties, never challenged the removal, even though their right to remand for lack of jurisdiction never expired. See § 1447(c). And, of course, it was the landowners, not MW and Apache, who induced removal by alleging violations of federal law in their complaint. Pet. App. 21-22.[2]

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[1] Petitioners try to manufacture a circuit conflict by implying that the court in *Morgan Guar. Trust* v. *Republic of Palau*, 971 F.2d 917 (2d Cir. 1992), found a non-removing defendant liable for removal costs under § 1447(c). Pet. 10. In fact, the *Morgan* case involved an award of fees against a *removing* defendant. The decision in no way supports such an award against a defendant that was not even a party at the time of the removal.

Petitioners also contend that the Fifth Circuit (presumably by distinguishing between removing and non-removing defendants) "rejected the 'joint and several' nature of the § 1447(c) award." Pet. 9. But, of course, a ruling that certain defendants *are not liable* implies nothing about how liability would be shared among parties that *were* liable.

[2] It should be added that the landowners' desire to penalize

(continued...)

Indeed, if any fee-shifting between the landowners and Apache and MW were appropriate here, then surely it would be the *landowners* who should pay *Apache and MW*'s costs and expenses. Nothing in the language of the statute limits liability thereunder to defendants. If a non-removing defendant may be subject to an award of costs under § 1447(c), then there is no reason why such an award should not be equally available against a plaintiff. And the landowners bear far more responsibility for the removal in this case than do Apache and MW.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] (...continued)
Apache and MW for their supposed *inaction* long after removal is quite inconsistent with their argument that the Fifth Circuit should not have considered their own post-removal conduct in denying the § 1447(c) award. Pet. 9.